EU Hotspot Approach and EU-Turkey Statement in Greece: Implementing a return policy? A legal perspective

juwiss.de/134-2017/

December 13, 2017

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With the entry into force of the EU-Turkey Statement on 20 March 2016, the political purpose of the EU Hotspots in Greece has been overhauled completely. Originally, EU Hotspots had been presented as a mechanism to implement the EU Relocation Program. Since 20 March 2016 however, the main purpose is the implementation of the return policy. The fast-track border procedure – applied in the EU Hotspots by Greek authorities with support by the European Asylum Support Office – is thus characterized by a preliminary admissibility procedure assessing whether Turkey can be considered as „safe third country".

EU Hotspot Approach in Greece – from relocation to return?

What is the purpose of the EU Hotspot Approach? The primary aim is to „assist frontline [sic!] Member States in meeting the challegnges presented by high migratory pressures at the EU's external borders". EU Hotspots can thus be understood as platforms for operational support by EU Agencies – most importantly the European Asylum Support Office (EASO), Frontex and Europol. However, operational support is not an end in itself, it serves an underlying purpose. In this regard, „the absence of legal clarity [as to the fundamental objectives of hotspots] is worrying".

Originally, the Hotspot Approach had been presented and understood inter alia as a tool to implement the EU Relocation Program. The idea of the Relocation Scheme, introduced by two Council Decisions adopted under Art. 78 para. 3 TFEU, was to alleviate pressure on national asylum systems located at the EU external border – a corrective measure which had become necessary due to the misallocation of responsibilities under the Dublin-III-Regulation. Quite apart from the fact that implementation of the Relocation Program hardly ever worked, asylum seekers who arrived at EU Hotspots located on the Greek islands as from 20 March 2016 have been treated as non-eligible for relocation in administrative practice – despite the lack of a clear legal basis for this view.

The reason is obvious. The first provision of the EU-Turkey Statement published only as a Press Release on 18 March 2016 reads: „All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law […]". Indeed, the main purpose of the EU Hotspots in Greece is now the implementation of the return policy.

EU-Turkey Statement – not an EU act?

On 28 February 2017, the General Court (EU Court of First Instance) surprisingly decided that the EU was not a party to the EU-Turkey Statement.

The General Court based its conclusion mainly on the circumstances of the adoption of the EU-Turkey Statement. On 17 and 18 March 2016, two meetings were held in the building usually used for the meetings of the European Council and those of the Council. The General Court concluded that in the first meeting, the heads of the EU Member States came together as members of the Council, but that the second meeting – the one in which the EU-Turkey Statement was adopted – was an international summit in which the heads of the Member States met with their Turkish counterpart. The Court interpreted the circumstances – such as invitation letter, protocols and table signs – as „corroborating the fact" that the EU was not involved in the adoption of the EU-Turkey Statement.

The reasoning of the General Court is not convincing. First: Even if the approach in evaluating the factual circumstances was correct, the conclusion of the Court is not persuasive. The meetings on 17 and 18 March were held in order to give effect to the EU Turkey Joint Action Plan of October 2015, the implementation of which had been in the hands of EU institutions. Second and more importantly: According to case law of the European Court of Justice (22/70 – AERT), the decisive question is the allocation of powers according to the Treaties. Considering the scope of Art. 78 et seq. TFEU, a lot speaks in favor of the conclusion that only the EU would have had the competence to conclude such an agreement with Turkey. Member States cannot amend the allocation of powers under the Treaties simply by changing invitation letters and protocols of the relevant meetings.

An appeal to the European Court of Justice has been lodged. The outcome is awaited.

Implementation – blurred responsibilities and accountability

Despite the numerous open questions on the EU-Turkey Statement – regarding the parties and whether it is of legally binding nature– the European Commission on 18 March 2016 appointed the General Director of the SRSS as „EU Coordinator" for the implementation of the EU Turkey Statement in Greece. Although the tasks of the EU Coordinator are not clearly defined, in December 2016 he concluded a „Joint Action Plan" with Greece aiming at increased efficiency of the return policy by further limiting procedural rights and enhancing detention capacity on the islands.

Implementation of the Hotspot approach at the central level lies with the so-called „inter-agency coordination meetings", chaired by the SRSS and in which national authorities and EU agencies participate. Coordination at operational level lies with the EU Regional Task Force in which national authorities are not represented and the responsibilities of which are not defined either.

Obviously, the „diffusion and overlap of competences […] renders accountability and […] attribution of liability quite blurry."

Hotspot Procedure – framed towards the aim of return

The amendment of the political purpose of the EU Hotspots obviously had severe repercussions both on reception conditions and on asylum procedures. The mandatory systematic detention scheme which had initially been introduced after 20 March 2016 has meanwhile been replaced by restrictions on the asylum seeker's freedom of movement to the respective island. Humanitarian conditions in the overcrowded hotspots are currently deteriorating again.

Since 20 March 2016, the EU Hotspot procedure is characterized by two main features.

First, it is conducted in the form of a so-called fast-track border procedure (under Art. 60 para. 4 Greek Asylum Law 4375/2016). The applicability of this special procedure introduced as a crisis mechanism has been extended again (Art. 86 para. 20 Law 4399/2016). On the one hand, procedural rights are severely limited in the fast-track border procedure, for instance, the time limit for an appeal is reduced to (merely) five days (Art. 61 para. 1 lit. d Law 4375/2016). On the other hand, enhanced involvement of the EU agency EASO is allowed for, in particular to support with conducting interviews. In practice, in the majority of cases EASO conducts the admissibility interview and drafts a so-called „concluding observation" on the basis of which the Greek authority then issues its decision. The Greek Council of State in its decision of 22 September 2017 decided that the involvement of EASO does not exceed the limits imposed by Law 4375/2016. According to EU law, however, EASO „shall have no powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection" (Art. 2 para. 6 EASO Regulation). In this regard, a complaint to the European Ombudsman has been lodged in April 2017.

Second, a preliminary admissibility procedure has been introduced: In case Turkey can be considered as a "safe third country" or a "first country of asylum" (under Art. 55, 56 Law 4375/2016 transposing Art. 35, 38 Asylum Procedures Directive), the asylum claim is dismissed as inadmissible (under Art 54 para 1 Law 4375/2016 transposing Art 33 Asylum Procedures Directive). Obviously, the question whether Turkey can be considered a "safe third country" is essential when it comes to implementing the return policy as foreseen by the EU-Turkey Statement. The European Commission has clearly expressed its view towards the Greek authorities. Until now however, the Greek Appeals Committees and Administrative Courts have been reluctant in accepting the Commission's view. In some cases, the required „connection" of the asylum seeker to Turkey (Art. 56 para. 1 lit. f Law 4375/2016) could not be established. In other cases reports have been invoked pointing to the fact that neither the legal nor the factual situation in Turkey comply with the requirements of a "safe third country". The Council of State in its decision on 22 September 2017, however, ruled in individual cases that Turkey can be considered as „safe".

The implications of this precedent on administrative practice in Greece remain to be seen.

The contribution is part of a series of three articles regarding the EU-Turkey Statement and the EU Hotspot Approach in Greece – it is preceded by yesterday's text by ELENI TAKOU, an article by CLARA ANNE BÜNGER and ROBERT NESTLER will follow. For a more detailed analysis see: Catharina Ziebritzki and Robert Nestler, „Hotspots" at the EU

External Border. A Legal Survey (Working Paper). Available online (in German): Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2017-17.

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